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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**MELISSA CONTE,**

**Plaintiff,**

**- against -**

**MANHATTAN DENTAL ARTS, et al.,**

**Defendants.**

**REPORT AND  
RECOMMENDATION**

**05 Civ. 10468 (LTS) (RLE)**

**RONALD L. ELLIS, United States Magistrate Judge:**

On November 24, 2008, Defendants submitted the instant motion to dismiss pursuant to Federal Rule of Civil Procedure 41 for Plaintiff's failure to prosecute, renewing a request made during a conference with this Court on October 18, 2007. Following a telephonic conference with the Parties on December 17, 2008, I recommend that Defendants' motion be **DENIED** with leave to refile should Plaintiff, now *Pro se*, fail to comply with her discovery responsibilities.


At the time Defendants first raised their allegations of failure to prosecute in this action, Conte was represented by Marc W. Garbar, of Garbar & Garbar, P.C. The undersigned considered Defendants' request premature and ordered a series of discovery deadlines that the Court expected would be strictly followed. However, subsequent circumstances culminated in this Court determining that Conte had terminated Garbar for cause. While Conte terminated Garbar on December 7, 2007, the Court ultimately determined Garbar should be considered terminated for cause on October 10, 2008. (*See* Docket No. 31.) As such, the Court concludes Conte is not to be faulted for any alleged failure to prosecute her case up to the time of the Court's order.

Based on the foregoing facts, I recommend Defendants' instant motion to dismiss for

failure to prosecute be **DENIED**. Should Conte fail to comply with her discovery responsibilities in accordance with the Federal Rules of Civil Procedure, Defendants may request leave to refile.

Pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have ten (10) days after being served with a copy of the recommended disposition to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Laura T. Swain, 500 Pearl Street, Room 755, and to the chambers of the undersigned, Room 1970. Failure to file timely objects shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (*per curiam*); 28 U.S.C. § 636(b)(1) (West Supp. 1995); FED. R. CIV. P. 72, 6(a), 6(d).

**SO ORDERED this 17th day of December 2008**  
**New York, New York**

  
**The Honorable Ronald L. Ellis**  
**United States Magistrate Judge**

**Copies of this Report and Recommendation were sent to:**

*Pro se* Plaintiff:

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